Date: 09/30/97

Case No.: 95-INA-598

In the Matter of:

LITTLE BEIJING RESTAURANT,
Employer

On Behalf Of:

YONG DING,
Alien

Appearance: Charles Law, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On March 28, 1994, Little Beijing Restaurant ("Employer") filed an application for labor certification to enable Yong Ding ("Alien") to fill the position of Cook, Chinese Specialty (AF 45-47). The job duties for the position are:

> Responsible for cooking Chinese dishes: preparing meats; vegetables and sauces prior to cooking; estimating food consumption and ordering food supplies; preparing and cooking all kinds of appetizers and other specialties according to the menu, such as Hunan Smoked Pork, Scallops A La Sichuan, General Cho's Chicken, Kung Pao Beef and Beijing Chive Pancake.
>
> The only requirement for the position is two years of experience in the job offered.

The CO issued a Notice of Findings on December 7, 1994 (AF 42-43), proposing to deny certification on the grounds that it appears that the application does not constitute an offer of employment as defined by the regulations at § 656.3. The CO stated that while the application lists a straight 40-hour work week, the Addendum to the ETA 750A only shows a 39-hour work week. Additionally, the CO stated that the menu documents submitted by the Employer shows that the Restaurant is closed on Mondays; therefore, this would account only for a 32-hour work week, which is too few hours to be considered full-time employment. Accordingly, the Employer was notified that it had until January 11, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated January 9, 1995, and submitted under cover letter dated January 11, 1995 (AF 23-29, 34-41), the Employer contended that a typographical error caused the one-hour discrepancy in hours worked (39 instead of 40), and submitted a corrected, amended Addendum. Next, the Employer explained that while the Restaurant is closed on Mondays, "the Cook is still needed to conduct estimating food consumption and ordering food supplies or to make food material purchasing from the food market." The Employer concluded that the job offer is for a 40-hour per week job and constitutes permanent, full-time employment.

The CO issued the Final Determination on January 19, 1995 (AF 18-22), denying certification because the Employer remains in violation of the regulations at § 656.3, as well as the requirements of *Gencorp*, 87-INA-659 (January 13, 1988). The CO continued to find that the fact that the Restaurant is closed on Mondays translates to a 32-hour work week or, if the Addendum attached to the Rebuttal is accepted, a 33-hour work week. The CO stated:

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

> The employer, while it had previously amended the ETA 750, Part A, a form which was completed under the condition that it was true and correct, says on rebuttal there was 'a typing error [in its] addendum.' However, it was the employer who signed the December 18, 1993 addendum to the ETA 750, Part A as true and correct, not the clerk. Thus, while the employer had previously declared the December 1993 addendum was true and correct, it also declares its rebuttal addendum is true and correct. Due to this contradiction, USDOL cannot readily determine which addendum is correct, and thus, is not persuaded by the employer's rebuttal argument.

Next, the CO determined that there is no documentation submitted that substantiates the Monday work requirement to be normal in the restaurant business. The CO referred to the Employer's rebuttal documentation that "the worker is not required to work on Mondays"[2] (emphasis added) and determined that the Employer argued without substantiation that the Monday working requirement is normal for the industry.

On February 23, 1995, the Employer requested review of the Denial of Labor Certification (AF 1-17). In August 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

The CO denied labor certification on the grounds that the Employer has documented that it is offering full-time employment. At the outset, we note that the matter of whether the application was properly amended to show 40 hours of employment versus 39 hours is of little concern in our analysis. The heart of the issue is whether the Employer has documented that the Alien will be required to work eight hours on Mondays, as it is not disputed that at least 31 hours and probably 32 hours of work are being offered for the balance of the work week.

The remaining basis for denial given by the CO was that the Employer had failed to document full-time employment because the Restaurant is closed on Mondays. The Owner responded that the Alien would be employed on Mondays preparing menus and food for the upcoming week.

The Board has held in *Gencorp*, 87-INA-659, (January 13, 1988), that,

> We are of the opinion that where a provision of the regulations requires information to be furnished in a specified form, e.g., documentation of experience 'in the form of statements from past or present employers,' Section 656.21(a)(3)(J), the regulation controls. In the absence of such a specific provision, where a

[2] We note that the copy of the Employer's rebuttal which appears at AF 24 reveals that the word "not" has been circled and the word "cook" is handwritten in. If the word "cook" is inserted, the Employer's statement reads, "Therefore, the worker is not required to cook on Mondays." While the author of the handwriting cannot be determined, this reading is consistent with everything else that the Employer has stated regarding the Alien's working hours.

> document has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the document, if requested by the CO, must be adduced. In all other cases, e.g., where an employer is required to prove the existence of an employment practice or the performance of an act and its results, written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation. This is not to say that a CO must accept such assertions as credible or true; but he/she must consider them in making the relevant determination and give them the weight that they rationally deserve.

In the instant case, the CO merely instructed that the Employer should "[s]ubmit evidence or documentation that the job offer constitutes permanent full-time employment. Full-time employment is 40 hours per week." Thus, the CO has not required the Employer to respond with information in a specified form. In our judgment, the Employer's written assertion that the job is full time (40 hours) is reasonably specific, indicates its basis, and must be considered sufficient documentation.

Moreover, the representations on rebuttal are consistent with the Employer's application, which mentioned that the Cook, Chinese Specialty, would also estimate food consumption and order food supplies as part of the duties of the job (AF 20, 45). This assertion is consistent with the rest of the record, that the position was duly posted and advertised, that prospective candidates had appropriate notice that the job would entail a 40-hour week which included these planning and other administrative functions among the duties of the position, and that the employee would be paid for performing such work.

Accordingly, we find that the CO's denial of labor certification must be **REVERSED**, and labor certification is **GRANTED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.